D.P.U. 88-8C, D.P.U. 89-8C, D.P.U. 90-8C,
D.P.U. 91-8C, D.P.U. 92-8C-A, D.P.U. 93-8C-1

Application of Western Massachusetts Electric Company under the provisions of G.L. c. 164, § 94G, for approval by the Department of the actual unit by unit and system performance of the Company with respect to each target set forth in the Company's approved performance programs for the performance periods between June 1, 1987 and May 31, 1993.

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I. INTRODUCTION

On May 5, 1994, Western Massachusetts Electric Company ("WMECo" or "Company") and the Attorney General of the Commonwealth ("Attorney General") (together, the "Parties") filed for approval by the Department of Public Utilities ("Department") a Joint Motion for Approval of Offer of Settlement and an Offer of Settlement ("Settlement") concerning the Department's ongoing review of WMECo's generating unit performance for the years 1988 through 1993, relating to the performance periods between June 1, 1987 and May 31, 1993, docketed as D.P.U. 88-8C-1, D.P.U. 89-8C-1, D.P.U. 90-8C-1, D.P.U. 91-8C-A, D.P.U. 92-8C-A, and D.P.U. 93-8C-1. The Company and the Attorney General requested that the Department approve the Settlement on or before May 25, 1994.[1] In addition to the Department, the Settlement was served on the Conservation Law Foundation ("CLF"), which is a party to both D.P.U. 92-8C-A and D.P.U. 93-8C-1, and all intervenors and limited participants in the Company's last base rate proceeding, D.P.U. 91-290 (See Western Massachusetts Electric Company, D.P.U. 91-290 (1992) ("WMECo")).[2] Both CLF and the Industrial Intervenors commented on the proposed

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[1] On May 25, 1994, the Company and the Attorney General agreed to extend the deadline for approval or rejection of the Settlement to May 26, 1994.

[2] The following persons intervened in D.P.U. 91-290: (1) the Attorney General; (2) CLF; (3) the Industrial Intervenors, a consortium of industrial companies located in WMECo's service territory including General Electric Company, Industrial Paper, Kimberly-Clark Corporation, Mead Company, Monsanto Company, and Smith & Wesson Corporation; (4) the Seasonal Users; (5) Massachusetts Public Interest Research Group; (6) Massachusetts Citizens for Safe Energy; (7) the Longmeadow Board of Selectmen; and (8) Massachusetts State Senator Jane M. Swift as a Limited Participant.

Settlement. The Company responded to 13 information requests from the Department on the proposed Settlement.

The Company is a wholly-owned subsidiary of Northeast Utilities ("NU"), an investor-owned public utility holding company based in Hartford, Connecticut. NU's other subsidiaries, affiliates of WMECo, include Northeast Utilities Service Company ("NUSCo"), which provides engineering, technical, and other services for NU-affiliated companies. WMECo is engaged in the generation, transmission, and distribution of electric power. In 1993, WMECo served 177,033 residential customers, 14,762 commercial customers, 811 industrial customers, and 582 street lighting customers in 59 cities and towns in western Massachusetts. During 1993, WMECo sold 3,610,407,766 kilowatthours ("KWH") and collected $371,713,445 in revenues.

The Company has full or part ownership in several generating units, including Millstone 1,[3] Millstone 2,[4] and Millstone 3,[5] which are three nuclear power plants located at Millstone Station in Waterford, Connecticut. In addition, WMECo receives some of its electric power requirements pursuant to contracts with other utilities and third-party-owned generating units. For example, WMECo has "life-of-the-unit" contracts with Connecticut

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[3] Millstone 1 is a 660 megawatt boiling water reactor that began commercial operation in 1970.

[4] Millstone 2 is an 870 megawatt pressurized water reactor that began commercial operation in 1975.

[5] Millstone 3 is a 1,150 megawatt pressurized water reactor that began commercial operation in 1986.

Yankee,[6] a nuclear power plant located in Haddam Neck, Connecticut, Vermont Yankee,[7] a nuclear power plant located in Vernon, Vermont, and Maine Yankee,[8] a nuclear power plant located in Wiscasset, Maine.

II. SUMMARY OF 1988-1993 PERFORMANCE REVIEW PROCEEDINGS

A. Introduction

The Department's review of the Company's generating unit performance has focused on the performance of the Company's nuclear units, which experienced multiple outages during the period that is the subject of the proposed Settlement. In the course of the proceedings that are summarized below, the Company has responded to more than 1,070 information requests. However, there are additional information requests outstanding that are the subject of dispute. These disputed information requests seek certain documents from the Company, including Institute of Nuclear Plant Operations reports ("INPO reports") and Nuclear Safety Engineering Group ("NSEG") documents.[9] In addition, there are several

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6 Connecticut Yankee is a 582 megawatt pressurized water reactor that began commercial operation in 1968.

7 Vermont Yankee is a 520 megawatt boiling water reactor that began commercial operation in 1972.

8 Maine Yankee is an 870 megawatt pressurized water reactor that began commercial operation in 1972.

9 NSEG documents are documents prepared by the NSEG, an internal organization at Northeast Utilities charged with monitoring the safety of plant operations and making recommendations to improve the safety of nuclear generating units. The United States Nuclear Regulatory Commission requires such on-site Independent Safety Engineering Groups to investigate and report on all "significant outages." See Clarification of Three Mile Island Action Plan Requirements, NUREG-0737, Item I.B.1.2; Technical Specifications, Millstone 3, NUREG-1176, Item 6.2.3.

disputes regarding the admissibility of Licensee Event Reports ("LERs").[10]

B. D.P.U. 88-8C

During the hearings in D.P.U. 88-8C-1, relating to the performance year June 1, 1987 to May 31, 1988, the Company objected to questions from Department staff concerning information in LERs, which had been provided by the Company in response to the Department's information requests. The Company also objected to the admission of the LERs into evidence. The Hearing Officer overruled the Company's objections; the Company appealed the Hearing Officer's ruling to the full Commission. To date, the Commission has not ruled on that appeal and no Order has been issued. There were no intervenors in this proceeding.

C. D.P.U. 89-8C

The status of the performance review case in D.P.U. 89-8C-1, relating to the performance year June 1, 1988 to May 31, 1989, is essentially identical to that of D.P.U. 88-8C, as case described above.

D. D.P.U. 90-8C

As in the prior two performance review cases, in D.P.U. 90-8C-1, relating to the performance year June 1, 1989 to May 31, 1990, the Department staff relied in its analysis on information presented by the Company in LERs. No Order has been issued.

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[10] LERs are prepared by nuclear operating companies for the United States Nuclear Regulatory Commission in response to significant events at nuclear power plants that may have safety consequences. Typically, they describe an event, its root causes, the possible safety consequences of the event, and a company's proposed corrective actions.

E. D.P.U. 91-8C

In D.P.U. 91-8C-A, relating to the performance year June 1, 1990 to May 31, 1991, the Department issued an order in which it made a finding of imprudence concerning certain events at Connecticut Yankee. The Company filed with the Department a motion for reconsideration of this finding ("Motion"). In its Motion, the Company made both factual and evidentiary objections. In D.P.U. 91-8C-B (1993), the Department granted, in part, the Company's Motion, for the exclusive purpose of addressing the Company's evidentiary objections, and allowed the Company to submit a memorandum in support of its claim that the Department made evidentiary errors. The Department ordered that the portion of the Company's Motion regarding factual errors would be addressed in an Order subsequent to the resolution of the Company's evidentiary objections. No subsequent Order has been issued by the Department on either the factual or the evidentiary objections of the Company.

F. D.P.U. 92-8C-A

The proceedings in D.P.U. 92-8C-A, relating to the performance year June 1, 1991 to May 31, 1992, have been delayed by a discovery dispute regarding NSEG documents describing certain outages at Millstone Station and Connecticut Yankee. On June 25, 1993, after reviewing WMECo's appeal of a hearing officer ruling, the Department ordered WMECo to produce the NSEG documents sought by the Attorney General under a non-disclosure agreement. Western Massachusetts Electric Company, D.P.U. 92-8C-A (Issued June 25, 1993) ("Order"). On December 8, 1993, the Massachusetts Supreme Judicial Court ("SJC") dismissed the appeal of WMECo from the Department's Order.

On February 25, 1994, after further exchanges of letters and affidavits, the

Department issued a Letter Order in which the Department reaffirmed its prior Order to compel production of the NSEG documents. The Company did not respond by the deadline. Accordingly, the Department has been investigating all available avenues to obtain the Company's compliance with its Order.

G. D.P.U. 93-8C-1

In D.P.U. 93-8C-1, relating to the performance year June 1, 1992 to May 31, 1993, the Department itself has sought the pertinent NSEG documents through a discovery request. As a result, the Department has been waiting for the resolution of the NSEG document dispute in D.P.U. 92-8C-A before proceeding further with discovery and hearings in D.P.U. 93-8C-1.

III. SETTLEMENT AGREEMENT

The proposed Settlement reduces WMECo's base rates on an equal percentage basis for all customers by $8,000,000 per year, effective for 20 months (June 1, 1994 through January 31, 1996).[11] The Settlement provides that base rates revert to current levels on February 1, 1996 and that no increase to WMECo's base rates would become effective before February 1, 1996.

Pursuant to the Settlement, the Company will begin booking post-retirement benefits other than pensions at the full FAS 106 level effective July 1, 1994 and will amortize over three years ending July 1, 1997 the deferred balance of FAS 106 expense on its books on

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[11] According to the Company, the proposed base rate reduction, when applied to the base rates (i.e., customer, demand, and energy charges) of each rate class, where applicable, would result in a 2.381 percent rate reduction (Company Response to Information Request DPU 1-1, at 1).

July 1, 1994. According to the Settlement, this results in additional expense recognition for WMECo for other post-retirement benefits of approximately $3,500,000 per year.

Also, the Company agrees to offer a five percent service extension discount ("SED") to its T-2 rate class customers with loads greater than or equal to one megawatt ("MW") who agree to provide the Company with five years notification prior to self-generating or taking electricity from a different provider, similar to Massachusetts Electric Company's service extension discount agreement.[12] From June 1, 1994 to January 31, 1996, the SED, combined with the proposed base rate reduction, will total five percent.[13] Effective February 1, 1996, the SED will be five percent. Concurrently, the Settlement increases notice provision for all non-residential customer classes from one year to two years.

The proposed Settlement terminates all pending portions of the Company's 1988 through 1993 generating unit performance review proceedings, relating to the performance

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[12] In its response to Information Request DPU 2-1, the Company stated: "It is the Company's hope that the Department will allow those customers who have agreed to accept the [SED] to remain on that rate after the next base rate case in accordance with the [SED] agreement. It is also the Company's hope that customers who haven't applied for the [discount] by the time of the next base rate case be allowed to participate in this program after that point in time. It was not the intent of WMECo to take flexibility away from the Department at the time of the Company's next rate case proceeding and therefore the continued availability of the [SED] will be determined by the Department at that time."

[13] In its response to Information Request DPU 1-8, the Company estimated that if 95 percent of all eligible T-2 customers opt for the SED, then the additional discount would be $2,817,000 over the 20 months of the base rate reduction (Company Response to Information Request DPU 1-8, at 1).

periods between June 1, 1987 and May 31, 1993.[14] In addition, the Company agrees to provide LERs to the Attorney General and the Department in future generating unit performance review proceedings without objection when requested in a timely manner in discovery. The Company may no longer use as grounds for objection to testimony or cross-examination on, or admission into evidence of, LERs: (1) that LERs are like subsequent remedial repairs; (2) that LERs cannot be used to prove negligence or the existence of a defect; (3) that LERs are prepared using hindsight; (4) that LERs are not relevant because they are a diagnostic tool prepared with a high standard of care in a safety rather than an economic context; or (5) that LER admission would have a chilling effect on the willingness of nuclear plant personnel to openly and honestly report their concerns to management. WMECo is not, however, precluded from arguing on brief that the Department should not rely on LERs or should assign little or no weight to LERs.

Finally, the Settlement provides that "the Attorney General, the Department, and the Company" agree that if the Settlement is approved, any and all requests, motions, appeals, and/or proceedings in all forums or venues related to discovery or production of documents, including, without limitation, the NSEG documents and any other "self-critical" documents at issue in the 1988 though 1993 performance review proceedings, initiated by the Attorney

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[14] In its response to Information Request DPU 1-6, the Company stated that the base rate reduction is not associated with specific outages, but rather is one of numerous components of the global settlement (Company Response to Information Request DPU 1-6, at 1). In addition, the Company stated that the Settlement represents a rollback of base rate increases resulting from the settlement approved by the Department in Western Massachusetts Electric Company, D.P.U. 91-290, and, therefore, represents a recognition of concerns expressed at that time regarding base rate increases (id.).

General, the Company, or the Department, shall be terminated or withdrawn.

The Settlement is expressly conditioned on the Department's approval, without change or condition, on or before May 25, 1994.[15]

IV. COMMENTS

A. Conservation Law Foundation

On May 16, 1994, CLF filed with the Department a letter with comments on the Settlement. In its letter, CLF stated that the Settlement is unclear as to whether Article II, § 2.1.B, which provides that no base rate increase for WMECo's ratepayers will take place before February 1, 1996, would preclude rolling lost base revenues ("LBRs") from the Company's conservation and load management ("C&LM") programs into base rates before February 1, 1996 (Letter at 1). CLF stated that accumulating LBRs are causing an upward pressure on the Company's conservation charge ("CC") and recommended, in its brief in D.P.U. 94-8-CC, that legal opportunities to roll LBRs back into base rates be examined over the next several months (id.). CLF asked for clarification from the Attorney General and the Company as to whether they interpret Article II, § 2.1.B, to preclude rolling LBRs into base rates prior to February 1, 1996 (id.).[16] CLF stated that if the clause does preclude such a roll-in, the Settlement is problematic since it would restrict an important alternative to alleviate upward pressure on the Company's CC (id.).

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[15] See note 1.

[16] See note 20.

B. Industrial Intervenors

On May 18, 1994, the Industrial Intervenors[17] filed with the Department an opposition ("Opposition") to the proposed Settlement. The Industrial Intervenors state that they are filing their Opposition because they object to the Settlement's method of passing on the rate reduction to customers as well as the terms and conditions of the proposed SED (Opposition at 2).

In their Opposition, the Industrial Intervenors argue that the Settlement's proposed base rate reduction of $8,000,000 per year over 20 months is directly contrary to the provisions of G.L. c. 164, § 94G, which requires that incremental replacement power cost[18] refunds be made through the Company's fuel charge (id. at 3). The Industrial Intervenors contend that the method employed by WMECo and the Attorney General in the Settlement has a significant adverse impact on large high-load factor customers, who purchased 38.7 percent of the kilowatthours sold by the Company, but who would receive only 31.1 percent of the base rate reduction under the Settlement (id. at 4).[19] The Industrial Intervenors note

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[17] See note 2. According to their May 18, 1994 filing, the Industrial Intervenors include Kimberly-Clark Corporation, Mead Corporation, Monsanto Company, Smith & Wesson, and Strathmore Paper Company. The Department notes that although the name of this group is the "Industrial Intervenors," they did not actually intervene pursuant to 220 C.M.R. § 1.03 in any of the performance review proceedings that the proposed Settlement would terminate.

[18] For the purposes of these proceedings, incremental replacement power costs are the difference between the costs for power to replace a unit which is not available for service across a given period, and the fuel and operating costs that would have been incurred had that unit operated as planned during the period.

[19] These percentages were derived from column (b) and column (g) of page 1 of the Company's bulk response to Information Request DPU 1-1.

that some customers who have entered into special contracts are in an even less favorable position vis-a-vis the Settlement because their contracts with the Company may not permit them to benefit fully from a base rate reduction (id.).

The Industrial Intervenors also express concern with the terms of the proposed SED; specifically, the provision in the Settlement that provides that the Company shall be authorized to maintain the five percent SED in future base rate proceedings and that the T-2 qualifying customer rate class shall, during the availability of the discount, have rates designed to produce revenues, after all discounts, equal to the fully allocated cost of service for that class (id. at 6; see Settlement at 3). The Industrial Intervenors contend that this provision renders the discount illusory (Opposition at 6). They conclude that the only circumstances under which an industrial customer would accept this offer would be if the customer is not aware that he or she would be required to pay the cost of the discount in the future (id. at 6-7).

C. Company Response

On May 24, 1994, WMECo filed a response ("Company Response") to the comments filed by CLF and the Industrial Intervenors. Regarding CLF's concern as to whether the proposed Settlement would preclude rolling LBRs into base rates, the Company states that, in its view, the Settlement does not preclude rolling LBRs into base rates (Company Response at 4).[20]

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[20] In a letter filed with the Department on May 25, 1994, the Attorney General stated that the Attorney General and WMECo do not regard a "rolling-in" to base rate energy charges of expenses currently collected through the Company's conservation

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Regarding the Industrial Intervenors' contention that the proposed rate reduction should be made on a per kilowatthour basis through an adjustment to the Company's fuel charge, rather than through base rates, the Company contends that while incremental replacement power costs found to be imprudent by the Department as the result of a generating unit performance review are subject to refund as provided by G.L. c. 164, § 94G(a), there is no such requirement for settlements approved by the Department (id. at 1). In addition, the Company argues that the proposed Settlement involves more than generating unit performance review proceedings and is not a final decision on the merits of the generating unit performance review dockets (id.). The Company argues that since there is no admission by any party, or finding by the Department in any of the performance reviews, the Industrial Intervenors' claim that there has been a disallowance of incremental replacement power costs that is covered by G.L. c. 164, § 94G(a), is specious (id. at 2). Accordingly, the Company contends that the Department is under no legal obligation to return the Settlement refund through the fuel charge, but, rather, is free to to apply the rate reduction in the manner designated in the Settlement (id.).

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[20](…continued)

charge as an "increase to WMECo's base rates" as that term is used in Article II, § 2.1.B of the Settlement (Letter at 1). Thus, the Attorney General states that it is not the intention of the Parties that approval by the Department of the proposed Settlement "would prohibit during the next 20 months a roll-in on a reconcilable and revenue-neutral basis" (id.).

Also on May 25, 1994, CLF filed with the Department a letter in which CLF stated that the assurances received from both the Company and the Attorney General regarding the "roll-in" issue adequately address CLF's concern and, accordingly, CLF has no objection to the proposed Settlement (CLF Letter at 1).

Regarding the Industrial Intervenors' comments on the proposed SED, the Company points out that the full amount of the discounts would be funded by WMECo's shareholders until the Company's next base rate case, at which time the Department would determine the future treatment of the discount (id. at 3). The Company also contends that its T-2 customers are fully capable of making sophisticated rate decisions (id.). In conclusion, the Company argues that the proposed SED is reasonable and should be accepted as part of the comprehensive Settlement (id. at 4).

D. Attorney General Response

On May 24, 1994, the Attorney General filed a response ("Attorney General Response") to the Opposition filed by the Industrial Intervenors. In the Attorney General's Response, the Attorney General asks that the Department reject the Industrial Intervenors's Opposition and approve the Settlement (Attorney General Response at 1). The Attorney General disagrees with the Industrial Intervenors' contention that G.L. c. 164, § 94G(a) requires refunds of replacement power costs negotiated by settlement to be made through the fuel charge rather than base rates (id.). The Attorney General points out that the Settlement contains no determination of imprudence regarding WMECo and, thus, there is no explicit return of excessive replacement power costs from the Company in accordance with G.L. c. 164, § 94G, as claimed by the Industrial Intervenors (id.). Accordingly, the Attorney General asserts that there is no requirement that refunds must be made on a per kilowatthour basis (id. at 2).

Regarding the contention of the Industrial Intervenors that they are not receiving their fair share of the refund because it is made via a base rate reduction, the Attorney General

asks the Department to consider whether the Industrial Intervenors are likely to be better off with continued litigation (id. at 2-3). The Attorney General asserts that the Department should not consider whether the Industrial Intervenors would be better off under some alternative, hypothetical set of terms, but should compare the terms of the proposed Settlement with the uncertain outcome of continued litigation (id. at 3). The Attorney General notes that underlying the Settlement are the parties' expectations regarding the timing of future base rate cases, the Department's ultimate treatment of FAS 106 expenses, and the uncertainty associated with any estimate of the eventual outcome of the performance reviews that may not be known for some time to come (id.). The Attorney General also suggests that the Settlement provides benefits to the Industrial Intervenors that have not been acknowledged (id.).

The Attorney General contends that in order for the Department to reject the Settlement on the basis of the Industrial Intervenors' Opposition, the Department must assume that continued litigation will yield at least the same quantum of benefits for the Company's customers (id. at 3-4). The Attorney General maintains that because the Industrial Intervenors were not a party the performance reviews and are without substantial knowledge of the issues in the case, they have no bases for evaluating the likely outcome of continued litigation or the overall merits of the proposed Settlement (id. at 4).

Furthermore, the Attorney General asserts that it would be poor regulatory policy for the Department to reject settlements because some customers with special contracts may not receive the same benefits from a settlement as customers without the benefit of special contracts (id.). The Attorney General argues that the SED is an integral part of the

Settlement and that ratepayers will benefit from the discounts (id.). Finally, the Attorney General notes that the terms of the Settlement concerning the future ratemaking treatment of the revenues foregone as a result of the discount bind only the Company and not the Department (id.).

In conclusion, the Attorney General states that the terms of the Settlement reflect fair compromises that advance all parties' interests, reduce the burden of continued litigation, and provide timely and advantageous benefits to all of the Company's customers (id. at 2). The Attorney General contends that the Settlement is clearly in the best interests of all ratepayers (id. at 5).

V. STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department must review the entire record as presented in the Company's filing and other record evidence to ensure that the settlement is consistent with Department precedent and the public interest and results in just and reasonable rates. See Colonial Gas Company, D.P.U. 93-78, at 6 (1993); Barnstable Water Company, D.P.U. 91-189, at 4 (1992); Western Massachusetts Electric Company, D.P.U. 92-13, at 7 (1992).

The Department's authority to review and approve settlements of generating unit performance review issues is derived from its statutory mandate to ensure that investor-owned electric utility companies achieve the lowest possible overall costs to their customers for the procurement and use of fuel and purchased power included in the fuel charge, consistent with accepted management practices, safety and reliability of electric service, and reasonable regional power exchange requirements. See G.L. c. 164, § 94G(a); see also

Boston Edison Company, D.P.U. 88-28 et al. at 9 (1989). In assessing the reasonableness of an offer of settlement that purports to settle performance review issues, the Department must scrutinize the settlement agreement in light of the evidentiary record and then weigh the settlement against the probable outcome and resulting rates were the performance review issues to follow the customary course to issuance of final Department Orders. Boston Edison Company, D.P.U. 88-28 et al. at 9-10. As part of its analysis, the Department must assess whether the financial accommodation reached between the company and other parties to the settlement agreement fairly repairs the harm to ratepayers that the company's actions and decisions may reasonably be said to have caused. D.P.U. 88-28 et al. at 10.

In order to assess the probable outcome of a performance review proceeding, the Department must apply the appropriate statutes and other precedent to the information available in the record. The Department's statutory authority for undertaking generating unit performance reviews is found in G.L. c. 164, § 94G. The Department is authorized to set a quarterly fuel charge for a company's recovery of prudently incurred costs for fuel and purchased power. G.L. c. 164, § 94G(b). To aid in determining the prudence of such costs at a later date, the Department is required to annually set performance goals for the generating units that provide electric power to jurisdictional electric companies. G.L. c. 164, § 94G(a).

Also in accordance with G.L. c. 164, § 94G, the Department conducts annual performance review proceedings wherein actual performance data obtained during a company's performance period are reviewed and compared to the goals that had been set for that period in a prior goal-setting proceeding. Should a company fail to achieve one or more

of the goals established for a performance period under review, the company must present evidence explaining the variance at the next fuel charge proceeding. G.L. c. 164, § 94G(a). The Department conducts an investigation into the circumstances behind each failure. These investigations typically involve a detailed review of activities surrounding particular generating units in order to determine whether a company, in operating and maintaining its units, followed all reasonable or prudent practices consistent with the statute. Specifically, if the Department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, the company shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the Department to be directly attributable to the unreasonable or imprudent performance. G.L. c. 164, § 94G(a).

VI. ANALYSIS AND FINDINGS

The Department has evaluated fully the provisions of the proposed Settlement in light of the entire record of all performance review proceedings that the Settlement seeks to terminate and finds that the Settlement's financial provisions fairly repair the harm to ratepayers that the Company's actions and decisions may reasonably be said to have caused. Accordingly, the Department finds that the Settlement is consistent with Department precedent and the public interest and results in just and reasonable rates. Therefore, the Department approves the Settlement.

The Industrial Intervenors contend that the Settlement's refund of imprudently incurred, incremental replacement power costs through the Company's base rates rather than

through the fuel charge is directly contrary to the statute governing the fuel clause (Opposition at 3). The statute states, in pertinent part:

> If the Department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance.

G.L. c. 164, § 94G(a).

The statute only requires imprudently incurred replacement power costs to be refunded through the fuel charge when the Department has made findings that a company has been unreasonable or imprudent in its generating unit performance. The Department has made no such findings in the performance review proceedings that the proposed Settlement seeks to terminate,[21] and the Department is expressly precluded from doing so by the terms of the Settlement (See Settlement at 3). In addition, the Department notes that the termination of the Company's 1988 through 1993 performance review proceedings is only one element of this comprehensive Settlement. Because the Settlement also resolves issues regarding excessive base rates and other rate matters, the refund from the Settlement of performance review and base rate issues may be executed through base rates.[22]

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[21] In D.P.U. 91-8C-A, the Department did make initial findings of imprudence; however, these findings are subject to change, adjustment, or reversal when the Department issues an Order on the Company's pending Motion for Reconsideration.

[22] The Department notes that its investigation into the prudence of purchased power costs incurred by Boston Edison Company as a result of an outage at Pilgrim Nuclear (continued…)

Regarding the Industrial Intervenors' criticism of the proposed SED and its potential impact on intra-class cost allocation after the Company's next base rate case, the Department has the authority terminate the SED for all customers prospectively when the Company files its next base rate case. The Department finds that issues regarding the continuation of the SED in any form are best addressed in that proceeding, in which the Industrial Intervenors will have an opportunity to intervene, as they did in the Company's last base rate proceeding. At a minimum, the SED offers no harm to the Industrial Intervenors and further benefits may materialize at the Company's next base rate case.

Regarding the concern expressed by CLF as to whether the Settlement would preclude the roll-in of LBRs into base rates prior to February 1, 1996, Article II, § 2.1.B, of the Settlement does appear to preclude any "increase to WMECo's base rates" prior to that date. However, since both Parties to the Settlement, in comments filed with the Department, agree that the Settlement would not preclude such a roll-in, the Department approves this section of the Settlement as interpreted by the Parties.[23]

In the past, the Department has consistently encouraged parties to settle issues,

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[22](…continued)
Power Station that began on April 12, 1986 and ended on December 21, 1988 concluded without findings when the Department approved a proposed settlement that terminated its investigation. See Boston Edison Company, D.P.U. 88-28 et al. at 2-3 (1989). Further, the Department notes that the terms of the settlement in D.P.U. 88-28 et al. provided for the withdrawal of Boston Edison Company's pending base rate increase request, docketed as D.P.U. 89-100, and its agreement not to seek any new increase in its base rates prior to November 1, 1992. D.P.U. 88-28 et al. at 3.

[23] The Department notes that there may be other valid reasons why a roll-in of LBRs into base rates absent a base rate case would be inappropriate.

consistent with the public interest, that would otherwise entail burdensome litigation; however, the Department notes the recent pattern of settlements in which issues are resolved that were neither part of a company's initial proposal, nor a subject of investigation by the Department. This raises a serious concern regarding the provision of adequate notice to persons who may be substantially and specifically affected by the settlement of such issues. We note that in this case, at least the parties to the Company's last base rate case were notified of the proposed Settlement, and the Department did receive comments from the Industrial Intervenors, who were a party in that proceeding. In future proceedings, the Department would prefer that parties settle only matters already under investigation and without bundling significant unrelated matters into compound settlements. Where such bundled settlements are presented, the Department will continue to scrutinize proposed settlements closely to ensure that appropriate notice has been provided to persons who may be substantially and specifically affected by such proposals. Furthermore, the Department will not hesitate to investigate such proposals whenever appropriate.

In accordance with the terms of the Settlement, our acceptance of the Settlement does not constitute a determination as to the merits of any allegations, contentions, or arguments made in this investigation. Finally, we note that our acceptance of the Settlement does not set a precedent for future performance review proceedings or rate filings, whether ultimately settled or adjudicated.

VII. ORDER

After due notice, hearing, and consideration, it is

ORDERED: That the Joint Motion for Approval of Offer of Settlement, filed on May 5, 1994, by the Attorney General and Western Massachusetts Electric Company, be and hereby is granted; and it is

FURTHER ORDERED: That the tariffs, M.D.P.U. Nos. 923 through 940, filed with the Department on May 17, 1994 by Western Massachusetts Electric Company, to become effective June 1, 1994, be and hereby are approved.

By Order of the Department,

_____
Kenneth Gordon
Chairman

_____
Mary Clark Webster
Commissioner